(3)

No. 88-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Petitioner, Consolidated Rail Corporation ("Conrail") submits this brief in reply to certain issues raised in the Brief of Respondents Railway Labor Executives' Association, et al. ("RLEA") in Opposition to Conrail's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

In its Petition for Writ of Certiorari, Conrail argued that this Court should grant the Petition for two reasons. First, the Third Circuit's conclusion that Conrail's addition of a drug screening test to its fitness for duty medical examinations created a "major" dispute under the Railway Labor Act ("RLA") placed its decision in direct conflict with prior decisions of the Courts of Appeals for the Seventh and Eighth Circuits. Second, without justification, the Third Circuit applied concepts unique to the National Labor Relations Act ("NLRA") to an issue arising under the Railway Labor Act ("RLA"). Conrail also urged that the important questions presented in this case should be resolved independently of

this Court's decision to grant or deny the pending Petition for Writ of Certiorari in the case of *Brotherhood of Locomotive Engineers v. Burlington N.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631 (April 1, 1988).[1]

In somewhat cursory fashion, the RLEA has responded to the above points. First, the RLEA contends that no inter-circuit conflict exists because the decisions of the Seventh and Eighth Circuits are distinguishable on their facts.[2] Second, the RLEA argues that the Third Circuit applied a traditional "major" versus "minor" dispute analysis in deciding the issue before it, and therefore there is no reason for this Court to disturb the Third Circuit's decision. Finally, the RLEA contends that this Court should not grant *certiorari* because Congressional legislation in the form of new drug testing bills will soon render moot any controversy over drug testing in the railroad industry. The RLEA has ignored what it chooses not to see. The inter-circuit conflict could not be clearer. The appellate courts need guidance in applying the RLA's major-minor dispute analysis

1. The RLEA agrees with Conrail's position that if the Court determines that there is sufficient overlap between this case and *Brotherhood of Locomotive Engineers v. Burlington N.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631, (April 1, 1988) it may wish to defer action on this case pending its decision in *Burlington N.* (Opp. Cert. 9). The issue in the Ninth Circuit's decision in Burlington Northern was whether drug testing for purposes of Rule G enforcement was a major or minor dispute.

2. The RLEA also argues that the Court's denial of the petition for certiorari filed in *Brotherhood of Maintenance of Way Employees v. Chicago & N.W. Transp. Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, U.S. , 108 S. Ct. 1291 (1988) should somehow be dispositive of the Court's decision with respect to the question presented here. However, that case is clearly factually distinguishable from the question presented here. In *Chicago & N.W.*, the union challenged the validity of a railroad's amendment of Rule G to prohibit off-duty use or possession of illegal drugs. Drug testing was not at issue.

without relying on NLRA principles. What Congress may do in late 1988 will not make moot what Conrail did in early 1987.

II. ARGUMENT

A. The RLEA Has Failed to Address the Conflicting Decisions of the Seventh and Eighth Circuits on the Identical Issue

In its brief, the RLEA correctly notes that, "In reaching its decision [that Conrail's fitness-for-duty drug testing is a major dispute under the RLA], the Third Circuit acknowledged that three other courts of appeal have considered *the same* or similar drug-testing issues under the RLA, with varying results and rationales." (Opp. Cert. 6) (emphasis added). The Third Circuit itself recognized that the issue it was deciding was identical to issues previously decided by both the Seventh and Eighth Circuits. The Third Circuit expressly said of the Seventh Circuit decision:

> *Railway Labor Executives Association v. Norfolk and Western Railway Co.*, 833 F.2d 700 (7th Cir. 1987), presented the Seventh Circuit with issues *almost identical* to those we confront here. *As here*, the railroad added a drug screen to the urinalysis that had been a routine element of the medical examination.

(Pet. App. A-12 to A-14; citations omitted; emphasis added). The Third Circuit likewise implicitly acknowledged that the medical testing issue decided by the Eighth Circuit was the same as the issue considered in this case, when it recognized that there were two separate issues before the Eighth Circuit:

> There were two separate testing issues before the Eighth Circuit in *Brotherhood of Maintenance of*

> *Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986). One, *which is not at issue here*, concerned the railroads' institution of post-incident testing to enforce Rule G.
>
> * * *
>
> The [Eighth Circuit] divided on the second issue, the railroad's institution of a drug screen as part of its periodic and return-to-duty medical exams. Two members of the court tersely reversed the district court's finding that the medical examination screening presented a major dispute.

(Pet. App. A-12 to A-14; citations omitted; emphasis added).

Notwithstanding the Third Circuit's own acknowledgement that its decision is in direct conflict with the Seventh and Eighth Circuits, the RLEA gratuitously submits that ". . . these cases can be distinguished on the specific facts of each case." (Id.)[3] However, as to this critical issue, the RLEA makes no attempt to explain to the Court why those cases are factually distinguishable. The RLEA has failed to set forth any factual distinction between this case and the Seventh and Eighth Circuit decisions. Its failure to do so bespeaks the similarity of those cases.

The need for the Court to resolve the inter-circuit conflict is greater now than when the Petition was first filed. As the case law in this area develops it becomes even more confused. In a recent decision in *Railway Labor Executives' Ass'n v. National Railroad Passenger Corp.*, No. 86-1235, (D.D.C. August 3, 1988) ("Amtrak")(see Appendix to Petitioner's Reply Brief), the United States District Court for the District of

3. Neither *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987) nor *Brotherhood of Maintenance of Way Employees v. Burlington N.R.*, 802 F.2d 1016 (8th Cir. 1986) is even cited in Respondent's brief.

Columbia held that Amtrak's addition of a drug screening test to its medical fitness-for-duty urinalysis created a major dispute under the RLA. Like Conrail, Norfolk and Western, and Burlington Northern, Amtrak had previously included urinalyses as part of its fitness-for-duty medical examinations, and the unions had acquiesced in this requirement. In April of 1983, Amtrak added a drug screening component to the urinalyses in all return-to-duty physical examinations. In July 1985, Amtrak added drug screens to all periodic physical examinations.

The district court in Amtrak noted the contrary decisions of the Seventh and Eighth Circuits, but chose instead to follow the reasoning of the Third Circuit. The district court's decision in the Amtrak case has been appealed to the Court of Appeals for the District of Columbia Circuit, *National Railroad Passenger Corp. v. Railway Labor Executives' Ass'n, appeal filed*, No. 88-7189, (D.C. Cir. August 8, 1988) thereby creating the possibility of further inter-circuit conflict. Clearly, the courts of appeals need guidance from the Court in applying RLA standards, in order to resolve this burgeoning area of conflict.

B. The Courts of Appeals Need Guidance on the Applicability of NLRA Principles to Cases Arising Under the RLA

The Third Circuit's decision in this case, as well as the decision of the district court in the Amtrak case and arguments raised in the RLEA's Brief, demonstrate the confusing overlap of RLA and NLRA principles in this area of the law, clearly showing the necessity of guidance from the Court. The RLEA's contention that the Third Circuit has correctly applied the RLA's major-minor dispute standard to this case (Opp. Cert. 6-7), mistakenly assumes that NLRA standards may be freely borrowed and applied to RLA cases. In particular, the

RLEA relies, as does the Third Circuit, on the determination of the General Counsel of the National Labor Relations Board ("NLRB") that drug testing should be a mandatory subject of bargaining under the NLRA, (Opp. Cert. 8), in order to conclude that it is a major dispute subject to bargaining under the RLA.[4] The Third Circuit and the RLEA conclude that the NLRB General Counsel's determination that drug testing was a mandatory subject of bargaining under the NLRA, and that a union's past acquiescence in drug screening did not constitute a waiver of its right to bargain under the NLRA, was sufficient to justify the conclusion that drug testing is a major dispute under the RLA.

The Court recently affirmed in *Communication Workers of America v. Beck*, U.S. , 108 S. Ct. 2641 (1988), that RLA and NLRA analogies are appropriate only after painstaking review of the statutory language, legislative history, congressional intent and institutional history under both statutes.[5] However, the Third Circuit uncritically borrowed an analysis of the duty to bargain under one labor statute, the NLRA, and applied it to another labor statute, the RLA. In so doing, the Third Circuit contradicted the Court's advice that "the NLRA and RLA differ in crucial respects," *Communication Workers of America v. Beck, supra*, 108 S.Ct. at 2648.

As Conrail argued in its Petition, the standards under the two statutes for determining when an employer must bargain are not the same. On the contrary, the RLA standard of whether a disputed action is

4. This mistaken assumption has also been made by the District of Columbia district court in *Railway Labor Executives' Ass'n v. National Railroad Passenger Corp., supra.*

5. Following such a detailed analysis, the Court ruled that the provisions of Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA governing union security provisions in collective bargaining agreements and the payment of union dues and fees are "statutory equivalents."

arguably justified under the collective bargaining agreement (and thus is a minor dispute) differs fundamentally from the NLRA standard of whether a union has clearly and unmistakenly waived the right to bargain. The NLRA imposes a heavy burden on the employer to demonstrate the union's waiver. If a waiver has occurred, the matter is ended. On the other hand, the RLA imposes only the relatively light burden of showing that a practice is arguably justified. If this threshold is met, the matter is referred to arbitration. Thus, the entire focus of the RLA's distinction between major disputes, which are bargainable, and minor disputes, which are subject to arbitration, is whether the challenged practice is permitted by the parties' existing practices or arguably justified under their collective bargaining agreement. The Third Circuit erred by applying NLRA concepts to the RLA case before it. Only this Court can correct the Third Circuit's error and state clearly the distinctions between the two statutes as they affect the process of collective bargaining.

The Third Circuit apparently failed to apply the proper RLA major-minor dispute analysis because the factual dispute involved drug testing. The RLEA argues that because drug testing is an important social issue, with potential for intrusion into employees' privacy, this singular consideration is enough to make drug testing in any form a major dispute under the RLA. Moreover, the RLEA contends that "[t]his case would reach constitutional proportions but for the fact that the testing is not mandated by a public agency." (Opp. Cert. 7).[6] How-

6. The district court decided that there was no constitutional issue involved in this matter because Conrail is not a federal actor subject to constitutional scrutiny. The Third Circuit noted that the RLEA did not appeal that portion of the district court's opinion to the Third Circuit. (Pet. App. A-6; A-25 to 26). Thus, this case presents no constitutional question for the Court to decide. The constitutional question of whether government mandated drug testing of railroad employees violates the Fourth Amendment will

ever, the importance of the underlying issue, or the magnitude of its impact on employee privacy, is not the test for determining whether a dispute is major or minor under the RLA. The RLA test is whether the practice is arguably justified under the parties' collective bargaining agreement or under their existing practices, not whether drug testing is a major or minor societal issue. Absent guidance from the Court, lower courts will continue to borrow incompatible statutory standards and to decide issues on a case-by-case basis. In doing so, they may distort well-established RLA principles which may have far reaching consequences for other areas covered by the RLA.

C. Pending Legislation Would Not Make This Controversy Moot.

The RLEA has argued that legislation pending in Congress would make the instant litigation moot because this legislation will clarify railroads' rights and obligations in conducting drug testing. (Opp. Cert. 9-10). However, pending legislation would not make this controversy moot, nor will it deal with those Conrail employees who have already been medically disqualified based on fitness for duty examinations because of positive drug test results. Whether Conrail had the right to institute its fitness-for-duty drug testing in February 1987, and remove from service employees who tested positive, is not a question that will be answered by the passage of future legislation. If this Court determines that Conrail did not have the right to add a drug screening test to its fitness-for-duty urinalyses, Conrail would be required to cease its current testing program, and any employees who have been disqualified under

NOTES *(Continued)*
be considered by the Court in its next term in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, U.S. , 108 S. Ct. 2033 (1988).

the program may be entitled to remedies under the Railway Labor Act. However, if it is determined that Conrail's addition of the drug screen to its fitness-for-duty medical examination is a minor dispute, affected employees would have the right to arbitrate their claims, including whether the drug screen was applied fairly.

Meanwhile, the pending legislation may or may not be passed in the near future, and the question of the right of railroads to conduct drug testing will remain mired in continuing court challenges by the RLEA. Indeed, it is disingenuous of the RLEA, having brought court challenges to both government mandated and private drug testing programs in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, U.S. , 108 S. Ct. 2033 (1988), *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987), *National Railroad Passenger Corp. v. Railway Labor Executives' Ass'n*, No. 86-1235 (D.D.C. August 3, 1988), *appeal filed*, No. 88-7189, (D.C. Cir. August 8, 1988) and the instant case, to argue now that the question is more appropriately answered by legislation.

III. CONCLUSION

For all of the reasons set forth above and in its original Petition, Conrail respectfully requests that its Petition be granted.

Respectfully submitted,

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REPLY APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,	:	
Plaintiffs	:	
	:	Civil Action
v.	:	No. 86-1235
	:	
NATIONAL RAILROAD PASSENGER CORPORATION,	:	
Defendant	:	

MEMORANDUM OPINION

The issue in this case is whether Amtrak's unilateral imposition of drug testing on its employees gives rise to a "minor" dispute under the Railway Labor Act over which this Court lacks subject matter jurisdiction or to a "major" dispute entitling the parties to an injunction maintaining the status quo while they bargain over the change.

The Court finds that drug testing is a substantial change in the employees' terms and conditions of employment not arguably predicated on an existing agreement and shall issue the injunction sought by plaintiffs. The case is before the Court on cross-motions for summary judgment. The Court finds that no genuine issues of material fact remain for trial and plaintiffs are entitled to summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56.

BACKGROUND

The Railway Labor Executives' Association, which is an association of railway labor unions, and a number of unions representing railway workers (collectively "the unions") have sued the National Railroad Passenger

Corporation (Amtrak), a private entity created by Congress in 1972 to provide intercity rail passenger service.

The collective bargaining contracts between the unions and Amtrak are silent on drug testing, physical examinations, and the use of alcohol or drugs. However, agreements include not only express terms, but terms implied by well-established past practice and by law. *See Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 153-54 (1969). Amtrak contends past practice provides a basis for drug testing of its employees.

For a number of years, Amtrak has required physical examinations of its employees. These examinations are conducted before an employee is hired, when an employee returns to work from a non-vacation absence of more than 30 days, and, for employees covered by the Hours of Service Act, 45 U.S.C. §§61-66 (1982),[1] periodically.[2] The medical standards and tests administered in these physical examinations have changed from time to time with medical developments, and Amtrak asserts that it has become established practice for the railroad to unilaterally make such changes.

Since the mid-1970s, the physical examinations have routinely included urinalysis, although a drug screen was not initially part of the urinalysis. A drug screen was performed only when, in the judgment of the examining physician, the employee may have been using drugs. In April, 1983, Amtrak began requiring a drug screen as part of the urinalysis in pre-employment

1. The Hours of Service Act covers employees who operate trains, handle train orders and other instructions regarding train movements, and construct, maintain, or repair signal systems. The Act does not cover supervisory employees, maintenance of way and car force employees, and members of other non-operating crafts.

2. Locomotive engineers must undergo physical examinations annually. Others covered by the Hours of Service Act must be examined every three years up to age 55, every two years up to age 69, and annually thereafter.

and return-to-work physical examinations. In July, 1985, Amtrak began requiring a drug screen as part of every mandatory physical examination, including periodic physicals.

Amtrak also requires urinalysis drug screening outside the context of a medical examination when there exists reasonable suspicion that an employee may be under the influence of alcohol or a drug. The record suggests the railroad began testing based on reasonable suspicion less than a year before this lawsuit was filed; previously, the railroad relied on supervisory observation to detect drug or alcohol impairment.

A rule of conduct, unilaterally implemented by the railroad, prohibits on-duty employees from working while under the influence of alcohol or drugs. That provision, asserted by Amtrak without contradiction by the unions to be long-standing, was known in prior years as Rule C and stated as follows:

> Reporting for work under the influence of alcoholic beverages or narcotics, or the use of alcoholic beverages while on or subject to duty or on Company property is prohibited.

In early 1985, Amtrak revised the rule, now designated as Rule G, to state as follows:

> Employees subject to duty, reporting for duty, or while on duty, are prohibited from possessing, using, or being under the influence of alcoholic beverages, intoxicants, narcotics or other mood changing substances, including medication whose use may cause drowsiness or impair the employee's responsiveness.

On April 15, 1986, Amtrak issued a 12-page document detailing its policy and procedure for drug and alcohol testing of employees covered by the Hours of Service Act. On January 1, 1987, the railroad issued a similar document for employees not covered by the

Hours of Service Act. Amtrak characterizes the documents as "modifications and codifications of Amtrak's pre-existing policies and practices."

The main difference in the two documents concerns post-accident testing, which is authorized for employees covered by the Hours of Service Act.[3] The documents state that an employee who tests positive for drugs or alcohol is subject to discipline and shall not be allowed to work until testing negative. An employee who tests positive three times in a row is subject to dismissal.

In a separate notice to employees covered by the Hours of Service Act, Amtrak warned that the urine test may detect off-duty drug use, without any on-the-job impairment, for up to 60 days. Unless the employee demands a blood test, a positive urinalysis "will support a presumption that you were impaired at the time the sample was taken."[4]

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3. The Federal Railroad Administration regulation requiring mandating post-accident blood and urine tests has been held to violate the Fourth Amendment. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988). The Ninth Circuit addressed the constitutionality of the government's *requiring* post-accident testing, of course, not the legality of the railroad imposing such testing unilaterally.

4. On August 15, 1987, while this lawsuit was pending, Amtrak revised its policy and advised employees that blood test results would no longer be relevant in a Rule G case because "Amtrak considers the mere presence of a drug in an employee's system as a violation of Amtrak Rule G. Hence, the objective of Amtrak's Drug/Alcohol Testing Program is not to determine influence, but to determine whether or not a prohibited substance is present in an employee's system." Amtrak Washington Division Notice 4-25 (Aug. 13, 1987), Exh. 1 to Plaintiffs' Reply to Defendant's Motion for Summary Judgment. In other words, it no longer matters to the railroad whether an employee is under the influence of a drug or impaired in any way; clearly, Amtrak has imposed a disciplinary rule based on employee's off-duty conduct, a departure from past practice that in itself has been held to constitute a major dispute. *See Brotherhood of Maintenance of Way Employees v. Chicago & North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988); *International Association of Machinists & Aerospace Workers v. Trans World Airlines*, No. 87-0403, slip op. at 23-25 (D.D.C. May 16, 1988).

The first grievance concerning Amtrak's modifications of its drug testing procedures was filed in April, 1986, by the Brotherhood of Maintenance of Way Employees, a plaintiff here. A number of similar grievances are now pending. This lawsuit was filed on May 2, 1986.[5]

The unions contend drug testing is not arguably justified by the established past practices relating to physical examinations and the prohibition against on-duty use of drugs or alcohol. Amtrak urges a much broader finding of what is implicit in the agreements between the railroad and the unions:

> Amtrak has had a long-standing and established practice of unilaterally: (1) developing and implementing comprehensive medical fitness standards and programs, including mandatory physical examinations and tests; (2) requiring urinalysis as part of all mandatory physical examinations; (3) requiring drug testing as a part of these urinalysis procedures; (4) revising or changing its medical standards including the battery of tests used in those mandatory physical examinations; (5) developing and implementing medical standards and policies, including revisions and expansions of its Rules of Conduct such as Rule G; and (6) developing and implementing a comprehensive drug and alcohol rehabilitative program (EAP) [Employee Assistance Program].

Defendant's Opposition to Plaintiffs' Motion for Summary Judgment at 17 (footnote omitted).

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5. Amtrak contends this lawsuit is barred by the statute of limitations. Even assuming, *arguendo*, that a major dispute is subject to a statute of limitation, the defense must fail because the record does not establish when the plaintiffs were notified of the changes being litigated.

It is a question of fact whether a practice or custom has become part of the contract by implication through long-standing observance or acquiescence of the parties. *See, e.g., Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3720 (U.S. Apr. 1, 1988) (No. 87-1631); *Railway Labor Executives' Association v. Norfolk & Western Railway Co.*, 833 F.2d 700, 705-06 (7th Cir. 1987). The Supreme Court has framed the inquiry as whether the practice has "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 154 (1969). The Eighth Circuit has stated that a "long-standing practice" should be considered part of the agreement when it "ripens into an established and recognized custom between the parties." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986).

In this case, the Court cannot find that Amtrak's practice of requiring drug testing, either in physical examinations or based on reasonable suspicion, has occurred for a sufficient period of time, with the knowledge and acquiescence of the unions, to become part of the agreement itself. The record does not reflect when Amtrak began testing based on reasonable suspicion, which precludes a finding that the practice was long-standing and established before the unions challenged the practice in April and May, 1986.[6] Drug testing was

6. In their Memorandum in Response to Plaintiffs' Supplemental Submissions, filed July 27, 1988, Amtrak's attorneys state that reasonable suspicion drug testing began "shortly after" Rule G was promulgated in 1985. However, the affidavit cited does not provide any date for the introduction of reasonable suspicion testing. At any rate, testing based on reasonable suspicion cannot be considered a "long-standing" or "established" practice if it began in 1985, the year before the practice was challenged in this lawsuit.

not required in pre-employment and return-to-work physical examinations until April, 1983, and in periodic physical examinations until July, 1985. At the most, routine drug testing was required for three years before the unions objected formally: in the case of periodic physical, the unions objected after nine months. This is not the length of time required for a practice to become so "long-standing" and "established" that it ripens into an implied working condition and an implied part of the collective bargaining agreement.

On the other hand, the Court finds that routine medical examinations and the rule against use of drugs or alcohol on duty are so well-established and long-standing as to be an implied working condition.

DISCUSSION

Relations between the unions and Amtrak are governed by the Railway Labor Act ("the Act"), 45 U.S.C. §§151-188 (1982). The Act is designed to provide for the prompt and orderly settlement of both fundamental contractual disputes and of grievances between the unions and management, to avoid the disruption of commerce caused by strikes or other means of self-help by either side. *Id.* §151a. The Act imposes on both the unions and the railroad a duty to negotiate whenever a dispute arises. *Id.* §152 First, Second. Beyond the initial stages of negotiation, the Act treats "major" and "minor" disputes differently.

The terms "major dispute" and "minor dispute" are not found in the Act, but have been supplied by the case laws. The Act speaks of "changes in agreements affecting rates of pay, rules, or working conditions," *id.* §156, as one kind of dispute, and of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working

conditions," *id.* §153(i), as another. The accepted distinction between major and minor disputes is found in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), where the Supreme Court said major disputes are those arising

> over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertions of rights claimed to have vested in the past.

Id. at 723.

> A minor dispute, on the other hand,
>
> contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

Id.

Major changes in the relationship between employees and the railroad may not be implemented unilaterally. For a major dispute, involving a change in the rates of pay, rules, or working conditions in a way not contemplated by the collective bargaining agreement, the parties must provide notice of the intended change and attempt to resolve it through negotiation, mediation, and possible presidential intervention. If a major dispute cannot be resolved, the union can strike in support of its position. *Railway Labor Executives' Association v. Norfolk & Western Railway Co.*, 833 F.2d 700, 704 (7th Cir.

1987); *see* 45 U.S.C. §156. In a minor dispute, on the other hand, minor changes in working conditions may be implemented unilaterally while settlement is sought through arbitration before the National Railroad Adjustment Board (NRAB). *See id.* §153. A minor dispute cannot be the subject of a strike.

The question of whether a dispute is major or minor determines the extent to which a federal court may become involved. If the dispute is major, the courts have broad powers to enjoin unilateral action by either side to preserve the status quo while statutory settlement procedures go forward. Such an injunction may issue without regard to the usual balancing of the equities. If the dispute in only minor, the court's power is more limited since the NRAB has exclusive jurisdiction over minor disputes. The traditional power to enjoin under equitable principles remains, but injunctive relief is usually inappropriate because irreparable loss and inadequacy of the legal remedy cannot plainly be shown until the NRAB has had an opportunity to act.[7] *See Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1021-22 (8th Cir. 1986).

Whether a dispute is major or minor depends on whether it is arguably comprehended within the agreement of the parties. As an initial step, the Court must determine what that agreement is. This factual inquiry has been completed here.

The test in this Circuit for determining whether a dispute involves only the interpretation or application of an existing agreement (and is therefore minor) or involves the formation of a collective agreement or a unilateral effort to change working conditions (and is therefore major) was established in *Southern Railway*

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7. The unions sought injunctive relief even if the Court found the dispute to be minor. This request is mooted by the Court's conclusion that the dispute is major.

Co. v. Brotherhood of Locomotive Firemen & Enginemen, 384 F.2d 323 (D.C. Cir. 1967):

> [W]here the railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a "major" dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by §6 [45 U.S.C. §156] for alteration of existing agreements.

Id. at 327. "Only if . . . the contract were not reasonably susceptible to the carrier's contention would this be a §6 dispute proper for a 'status quo' injunction." *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1173 (D.C. Cir. 1972) (emphasis omitted) (quoting *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972) (footnote omitted)), *cert. denied*, 411 U.S. 906 (1973). "But where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, as illuminated by long-standing practices, the question of whether the position is well taken involves a minor dispute." *Id.* at 1172 (emphasis omitted) (quoting *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). Other circuits use different formulations,[8] but the result is the

8. *E.g., Independent Federation of Flight Attendants v. Trans World Airlines*, 655 F.2d 155, 158 (8th Cir. 1981) (dispute minor if agreement "reasonably susceptible" to interpretation advanced); *REA Express, Inc. v. Brotherhood of Railway, Airline, and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.) ("arguable basis"), *cert. denied*, 409 U.S. 892 (1972); *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988) ("arguably justified"), *petition for cert. filed*, 56 U.S.L.W. 3720 (U.S. Apr. 1, 1988) (No. 87-1631).

The First and Third Circuits have adopted the "obviously insubstantial" test of this Circuit. *See United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, 544 (3d Cir. 1974); *Airlines Stewards & Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969). The Seventh Circuit uses the "obviously insubstantial" test and also asks whether the claim of contractual justification is "frivolous." *See Atchison, Topeka & Sante Fe Railway Co. v. United Transportation Union*, 734 F.2d 317, 321 (7th Cir. 1984).

The Sixth Circuit uses both the "arguably justified" and "obviously insubstantial" standards. *See Local 1477 United Transportation Union v. Baker*, 482 F.2d 228, 230 (6th Cir. 1973).

same: the burden on the party proposing the change is relatively light. When in doubt, courts generally construe disputes as minor, as such a finding is less likely to result in disruption of commerce.

In this instance, the Court must determine whether the new practice of drug testing is arguably predicated on the agreement between the unions and Amtrak, including implied terms. To find that the agreement arguably justifies drug testing, the Court must determine "that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue." *Railway Labor Executives' Association v. Consolidated Rail Corp.*, 845 F.2d 1187, 1193 (3d Cir. 1988).

Stripped to its essentials, Amtrak's argument is that the established past practices involving medical fitness for duty standards, physical examinations, and enforcement of rules against alcohol and drug use on the job arguably justify the new practice of drug testing during physical examinations and based on reasonable suspicion. The Court, however, finds it implausible to believe, based on the unions' acquiescence in the established past practices, that there was a meeting of the minds on the general issue of drug testing.

The Court notes that the circuits have split when similar issues have been presented under the Railway Labor Act. *Compare Railway Labor Executives' Association v. Norfolk & Western Railway Co.*, 833 F.2d 700 (7th Cir. 1987) (addition of drug testing to all physical

examinations constitutes minor dispute) *and Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986) (introduction of post-accident and return-to-work drug testing minor dispute) *with Railway Labor Executives' Association v. Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988) (addition of drug testing to all physical examinations major dispute); *International Brotherhood of Teamsters v. Southwest Airlines*, 842 F.2d 794 (5th Cir. 1988) (introduction of post-accident and reasonable suspicion drug testing major dispute); *and Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087 (9th Cir. 1988) (introduction of post-accident drug testing major dispute), *petition for cert. filed*, 56 U.S.L.W. 3720 (U.S. Apr. 1, 1988) (No. 87-1631). While the decisions are enlightening, the Court is mindful that each is grounded on factual determinations of the scope of the agreement between the parties, and are not dispositive of the issues framed by this case.

Clearly, however, some courts have found mandatory drug testing to be arguably justified as a refinement of either the practice of subjecting employees to medical examinations or the practice of enforcing the rule against alcohol or drug impairment. Other courts have reached contrary conclusions. In this regard, the Court finds the views of Rosemary Collyer, General Counsel of the National Labor Relations Board, quite helpful. Collyer has stated unequivocally that mandatory drug testing constitutes a "substantial change in working conditions" even where there is an existing program of mandatory physical examinations and even where established work rules preclude the use or possession of drugs on the job.

> In cases where an employer has an existing program of mandatory physical examinations for employees or applicants, an issue arises as to whether the addition of drug testing constitutes a substantial change in the employees' terms and conditions of employment. In general, we conclude that it does constitute such a change. When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work. A drug test is designed to determine whether an employee or applicant *uses* drugs, irrespective of whether such usage interferes with the ability to perform work. In addition, it is our view that a drug test is not simply a work rule — rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is a "material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally.
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> NLRB General Counsel's Guideline Memorandum Concerning Drug or Alcohol Testing of Employees, Memorandum GC 87-5, at 6 (Sept. 8, 1987), *reprinted in* Daily Labor Report No. 184, at D-1, D-2 (Sept. 24, 1987).

The Court agrees with the learned General Counsel for the NLRB that the addition of drug testing to physical examinations is a substantial change in working conditions. The railroad unions' acquiescence in

physical examinations, even those including urinalysis, cannot even arguably justify a conclusion that there was a meeting of the parties' minds on the general issue of drug testing. Addition of drug testing to physical examinations is a significant departure from past practice and a substantial change in the terms of the agreement. This plainly is not a dispute in the nature of a grievance relating "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723 (1945). Rather, it is an attempt to "change the terms" of an agreement. *Id.*

Nor is mandatory drug testing based on reasonable suspicion a mere refinement of long-standing methods used to enforce Rule G. The Court finds that the primary method of enforcing the rule against alcohol or drug use on the job was by supervisory observation. Supervisors acted only when they observed objective signs of drug or alcohol use such as slurred speech, staggering gait, bloodshot eyes, sudden changes in personality, or increased absenteeism. Drug testing is intrinsically and significantly different from supervisory observation; it is more intrusive, it reveals information about the off-duty conduct of employees, and it raises a host of concerns about accuracy and reliability, interpretation of the test results, confidentiality, and so forth.[9] The Court is unable to conclude that the unions' acquiescence in the past practice of Rule G and its enforcement by sensory observation arguably justifies drug testing.[10] Amtrak's

9. It is significant that when conducted by government, urinalysis drug testing is a search and seizure within the meaning of the Fourth Amendment. *E.g., National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987). Observation by supervisors, of course, does not constitute a search or seizure.

10. The General Counsel of the NLRB reached a similar conclusion. "[A] union's acquiescence in a past practice of requiring applicants and/or current employees to submit to physical examinations that did not include drug testing, or in a rule prohibiting the use or possession of drugs on company premises, does not constitute a waiver of the union's right to bargain over drug testing." NLRB General Counsel's Guideline Memorandum at 9, *reprinted* in Daily Labor Report No. 184, at D-2.

program is a dramatic departure from past practice, where drug testing was conducted during physical examinations only when, in the judgment of the examining physician, the employee may have been using drugs. The current program, imposed unilaterally by the railroad, encompasses testing in circumstances where there is no suspicion whatsoever.

CONCLUSION

This case does not deal with the legality of private employers' requiring a drug test as a condition of employment, or the constitutionality or propriety of drug testing generally. "It deals only with the rights of a collective bargaining representative to participate in the formulation of a mandatory drug testing program, to negotiate over the shape that program will take." *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794, 799 (5th Cir. 1988). "The determinative factors are not whether drugs are dangerous, or whether drug testing is intrusive, but whether the program of mandatory testing and punishment chosen by [the carrier] is consistent with the collective bargainaing [sic] agreement. . . ." *Id.* Railroads other than Amtrak have been ordered by the courts to resolve these issues by reference to established principles under the Railway Labor Act; in at least one instance railroad and union have negotiated in good faith and reached agreement on a drug and alcohol policy. *See* Agreement Between CSX Transportation, Inc., and the Chesapeake and Ohio Railway Company and Its Employees Represented by United Transportation Union (Aug. 6, 1987),

Exh. 4 to Plaintiffs' Reply to Defendant's Motion for Summary Judgment.

In summary, both justifications proffered by Amtrak for its drug testing are "so obviously insubstantial as to warrant the inference that [they are] raised with intent to circumvent the procedures prescribed by §6 for alteration of existing agreements." *Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967).

The imposition of drug testing gives rise to a major dispute entitling the unions to an injunction maintaining the status quo while they bargain with Amtrak over the issue.[11] An appropriate Order accompanies this Memorandum Opinion.

/s/ THOMAS F. HOGAN
Thomas F. Hogan
United States District Judge

DATE: August 3, 1988

11. Count III of the unions' complaint alleges a violation of the Fourth Amendment. Plaintiffs have failed to show for purposes of this lawsuit that Amtrak is a federal actor whose actions are subject to constitutional scrutiny. They claim Amtrak is a governmental enterprise because it was created by Congress and relies heavily on federal funds. This argument has been uniformly rejected by federal courts and this Court concurs in their analysis. *See, e.g., National Railroad Passenger Corp. v. Two Parcels of Land*, 882 F.2d 1261, 1264 (2d Cir.), *cert. denied*, 108 S. Ct. 347 (1987); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984); *Hankin v. National Railroad Passenger Corp.*, No. 86 C 7233, slip op. at 6 (N.D. Ill. Nov. 9, 1987); *Kimbrough v. National Railroad Passenger Corp.*, 549 F. Supp. 169, 172-73 (M.D. Ala. 1982); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, *Plaintiffs*	:	
	:	Civil Action
v.	:	No. 86-1235
NATIONAL RAILROAD PASSENGER CORPORATION, *Defendant*	:	

ORDER

For the reasons set forth in the accompany [sic] Memorandum Opinion, it is this 3rd day of August, 1988,

ORDERED that plaintiffs' motion for summary judgment is granted; and it is

FURTHER ORDERED that defendant's motion for summary judgment is denied; and it is

FURTHER ORDERED that defendant is enjoined, pursuant to 45 U.S.C. §156, from implementing, with respect to Amtrak employees represented by the plaintiffs, its policy of requiring urinalysis drug and alcohol testing, pending exhaustion of the procedures set forth in the Railway Labor Act, 45 U.S.C. §156. This injunction shall not apply to toxicological testing mandated by federal law or regulation.

/s/ THOMAS F. HOGAN
Thomas F. Hogan
United States District Judge